IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 53 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE AKSHAY H.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAMANBHAI SOMABHAI KHARADI - Appellant(s)

Versus

STATE OF GUJARAT - Opponent(s)

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Appearance :

MR KJ SHETHNA for Appellant(s) : 1,MR HORMAZ B SHETHNA for Appellant(s) : 1,
PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKSHAY H.MEHTA

Date : 02/09/2005

ORAL JUDGMENT

1.The appellant, who was original accused in Sessions Case No. 17/1995 in the Court of Ld. Addl. Sessions Judge, Kheda at Nadiad, was charged of committing offences made punishable under sec. 304 Part-II, 324,

435 and 285 of IPC. He was, ultimately, found guilty of committing those offences and ld. Judge by judgment and order of conviction and sentence passed on 11.1.1999 convicted him for these offences and imposed various sentences. For offence under sec. 304 Part-II, he has been awarded S/I for 3 years and fine of Rs. 250/-, for offence under sec. 324 of IPC, S/I for 2 years and fine of Rs. 200/-, for offence under sec. 435 of IPC, S/I for 1 year and fine of Rs. 150/- and for offence under sec. 285 S/I for 3 months and fine of Rs. 100/-, in default, R/I for one month.

2. The case of the prosecution is that at the relevant time, the appellant was attached to Bhadaran Police Station and was discharging the duty as Writer Constable. On 6.7.1993, around 5.30p.m., one tanker containing highly inflammable substance namely Neptha turned turtle on the highway between Bhadaran- Gambhira near cemetery of Bhadaran. The tanker was bearing registration No. GJ-12/5549. As a result of this, there was extensive spillage of neptha on the road. Many persons had gathered there to see the accident. Bhadaran Police Station was also given information regarding the accident. Certain policemen were therefore, dispatched to the spot. The appellant was one of them. Police persons were asking the crowd to

stay away from the place. It is the case of the prosecution that all of sudden, the appellant threw a burning match stick on the ground, as a result of the same, neptha being highly inflammable liquid, immediately caught fire causing injuries to by-standers. They were deceased Vinubhai Dholabhai Patel, Haribhai G. Patel and Girishbhai M. Chavada and also several other persons namely Indravadan Dhulabhai Patel, Chhatrasinh Bharatsinh Mahida, Pramodbhai Manibhai and two sons of Police Constable attached to Bhadaran Police Station. Son of Vinubhai had also received burn injuries. The injured persons were immediately removed to Karamsad hospital for treatment. They were admitted in S.K. Hospital, Karamsad.

3. At the hospital, deceased Haribhai Govindbhai Patel on 7.7.1993 around 18.30 hrs. gave FIR to the police. On receipt of the information, the police commenced investigation and on conclusion of the same, submitted charge-sheet against the appellant for the offences under sec. 285, 304, 324, 326 and 435 of IPC. It may be noted here that upon admission of the patient to the hospital, arrangement to record the dying declarations was made and accordingly dying declarations of Haribhai Govindbhai Patel and Girishbhai Motibhai Chavda were recorded. It appears that dying declaration of

Vinubhai, one of the deceased, was not recorded. In view of the fact that both Girishbhai and Haribhai subsequently expired, their dying declarations have been brought on record at ex. 46 and 45, respectively. The FIR was given by deceased Haribhai and upon his death, the same was treated as dying declaration and it was brought on record at ex. 41.

4. At the trial, the ld. Addl. Sessions Judge framed charge against the appellant at ex. 2 on 17.1.1998. He was charged for the offences made punishable under sec. 285, 304, 324, 326 and 435 of IPC. The appellant pleaded not guilty to the charge and claimed to be tried.

5. The prosecution in support of its case, examined 13 witnesses and also placed reliance on the documentary evidences such as PM Notes, medical certificates, dying declarations and various panchanamas.

6. After recording of the evidence was over, ld. Judge recorded further statement of the appellant under sec. 313 of CrPC. It appears that no specific defence was pleaded but there was general denial. However, in reply to the last question, he has stated that in accordance with the oral instructions given by the police officer, he had gone to the spot, where the tanker had turned turtle to maintain bandhobast. There were about 400 to

500 persons. He was asking the crowd to stay away from the place and in the process, there was hot exchange of words with the crowd. In the meanwhile, there was fire on the tanker and, consequently, several persons received burn injuries. He states that since he had altercation with the crowd, his name has been falsely involved in the present case. It may be also noted here that in response to the question put to him to the effect that PW-9 Sahidmiya Kasammiya had stated in his evidence that on 6.7.1993, he (the appellant) was attached to Bhadaran Police Station as Crime Writer, what he had to say about it? In reply, he has stated that it was true.

7. At the end of the trial, ld. Addl. Sessions Judge came to the conclusion that the prosecution had been able to prove the guilt of the appellant for offences under sec. 304 Part-II, 324 and 435 of IPC. He, therefore, convicted him for the said offences and, thereafter heard him on the question of sentence. Ultimately, by judgment dated 11.1.1999, the ld. Trial Judge imposed sentence as stated above on him. Hence, this appeal.

8. I have heard Mr. KJ Shethna ld. Advocate appearing on behalf of the appellant and Mr. PR Abichandani ld. APP for the State. Mr. Shethna has submitted that by no stretch of imagination, it could be held that the

appellant has committed the offence under sec. 304 Part-II. In his submission, considering the facts and circumstances of the case, in no way, any knowledge can be attributed to the appellant about the consequences of his act and, therefore, his conviction under sec. 304 Part-II is not legal. He has further submitted that there is no reliable evidence on record to show that it was the appellant who was responsible for causing fire and the resultant injuries to the deceased persons and also to other injured persons. He has submitted that there is no oral evidence by which the identity of the appellant as the person responsible for causing fire can be fixed. So far as dying declarations are concerned, according to Mr. Shethna, they are also not reliable. He has particularly assailed the dying declaration of Haribhai by drawing my attention to the words 'Bhadaran Police Station' which are written in the margin to show that it was a subsequent interpolation to involve the present appellant. He has lastly submitted that even in the facts and circumstances of the case, there is hardly any material to hold the appellant guilty of the offence under sec. 304 Part-II. In the alternative, he has submitted that the appellant deserves to be given benefit of probation under sec. 360 of Code of Criminal Procedure. Mr.

Shethna has cited following decisions; i.e., the decision rendered in the cases of **A.P. Raju vs. State of Orissa reported in 1995 SCC (Cri.) 675, Ambalal D. Bhatt vs. The State of Gujarat, reported in (1972)3 SCC 525, State of Karnataka vs. Satish reported in (1998)8 SCC 493, Rakesh Ranjan Gupta vs. State of U.P. & Anr., reported in (1999)1 SCC 188.**

9. Mr. PR Abichandani ld. APP, on the whole, supported the judgment of the trial court, however, he has candidly stated that it would be farfetched to hold the appellant guilty for the offence under sec. 304 Part-II, however, he has vehemently submitted that on the facts and circumstances of the case, he can at least be held guilty of committing offence under sec. 304 A of IPC. In his submission, sec. 304 A being a lesser offence, this court can always hold him guilty and award sentence accordingly and no prejudice is likely to be caused to the appellant, even when there is no charge under sec. 304 A of IPC. He has submitted that so far as identity of appellant is concerned, there is no scope for accepting the submission of Mr. Shethna for the appellant because the appellant himself has admitted this fact. Lastly, he has submitted that even if the witnesses have turned hostile, the dying declarations coupled with the FIR which has also become

dying declaration on the demise of Haribhai, are absolutely trustworthy and reliable and the conviction can be based solely on the same. He has, therefore, prayed that the appeal has no merit and it may be dismissed.

10.With a view to re-appreciate the evidence, I have carefully gone through the record of appeal. The prosecution has examined PW-1 Shaileshbhai Rambhai Patel Ex. 6. He has not supported the prosecution and he has been declared hostile, hence, there is no need to discuss his evidence here. PW-2 Indravadan Dhulabhai ex. 8 has stated that the incident had taken place about 5 years prior to the date of his deposition. According to him, the tanker had turned turtled near the cemetery. At that time, he did not know what was contained in the tanker but later on it transpired that it was some chemical. With him, his elder brother Vinubhai Dholabhai was also there. They were walking on the side of the road, at that time, all of sudden there was fire in the tanker and both of them received injuries. According to the witness, they were admitted in the hospital and Vinubhai expired during treatment. The witness has stated that what was the cause of fire he did not know. In the cross-examination, he has, however, stated that the co-patient who was also

injured in the incident had told him that it was the appellant who had caused fire.

11.PW-3 Nilesh Haribhai Ex. 9 and PW-4 Shashikant Jayantibhai Mekwan have not supported the prosecution case and they have been declared hostile, hence, there is no need for me to discuss their evidence.

12.PW-5 Kadarhusen Mehmoodbhai Ex.12 has stated that the tanker was lying in a pit near the cemetery. When he went near the tanker, there was fire and he received burns injury on his chest. His friend Shashikant also received burns. It was police who brought him and admitted in the hospital. He has stated that whether he was interrogated by the police he did not know. He has also stated that he did not remember whether the appellant was present there. In the cross-examination, he has stated that there was crowd of 400 to 500 persons, but whether the police was removing them from the spot, he did not know. He has also shown ignorance about any altercation between the policemen and the crowd.

13.PW-6 Pramodbhai Manibhai Patel Ex. 13 stated that in this incident, several persons including his nephew and he himself had received burn injuries and Haribhai Govindbhai, Vinubhai Dholabhai and Girishbhai Makwana had expired. He has further stated that he did not know

what was the cause of fire.

14.PW-7 Chhatrasinh Bharatsinh Mahida Ex. 14 has not supported the case of the prosecution and he has been declared hostile.

15.PW-8 Dr. Anand Dadaso Patil Ex. 20 is the Medical Officer attached to Bhadaran Mitra Mandal Hospital at the relevant time. According to him, on 6.7.1993, at about 5.30p.m., Vinubhai Dholabhai was brought to him without police yadi. He had received accidental burn injuries. There were injuries on face, chest, stomach and legs. After giving primary treatment, he was referred to Karamsad Hospital. He has further stated that Pramodbhai Manibhai Patel was also brought to him for treatment. He was conscious. He had received burn injury on account of the fire at the place of accident. He has further stated that Girishbhai Motibhai Chavada was also brought to him since he had received burn injury at the place of accident. In cross-examination, he has stated that if a person had received 40% burns injury, there were chances of his survival, however, it would more depend on the fact whether the patient had received first degree or second degree or third degree burns.

16.PW-9 Sahidmiya Kasammiya Ex. 25 was also discharging duty as Crime Writer. He has stated that around

4.30p.m., he was working in the police station, at that time, police station in-charge Head Constable Abhesinh informed him that on Gambhira road, on the out-skirt of Bhadaran, a tanker containing neptha had turned turtle and people had gathered there. He was, therefore, directed to go there and maintain law and order. He has further stated that other policemen namely Himatbhai Jamadar, Constable Ramanbhai and Constable Hibatullah etc. were sent there. While he was removing the crowd, there was all of sudden fire. The fire brigade was summoned and many persons had received injuries. He has identified the appellant in the court. In cross-examination, a suggestion has been made which has been denied by him that since the crowd was not following the instructions of the police, there was altercation between the members of crowd and the appellant.

17.PW-10 Amarsing Malaji Ex. 38 was working at Vidyanagar Police Station as Police Station Officer. According to the witness, he received written intimation from Dr. Siddharth of Karamsad hospital around 8.50 hrs. that a tanker containing chemical had turned turtle near Bhadaran and two persons namely Haribhai and Girishbhai had received burn injuries and they were admitted in Karamsad hospital and during treatment, Girishbhai and Haribhai had expired. It is further

stated that on receipt of the information, he registered accidental death in the register. There is no cross-examination of this witness.

18.PW-11 Jabbarbhai Hamirbhai Ex. 39, the PSI, who at the relevant time, was attached to the Bhadaran Police Station, in his evidence, he has stated that he had received information about tanker carrying neptha meeting with an accident. The offence regarding accident was registered. He has further stated that there was fire at the spot and many persons had received burns injuries. He was Investigating Officer, who had recorded the statements of various witnesses. The Ld. APP has drawn his attention to statement of various witnesses who were declared hostile to bring on record their version given at the first instance before the police. It shows that before the police, it was stated by the hostile witnesses that it was the appellant who had thrown burning match stick at the spot which caused fire. In the cross-examination, he has been put certain questions to challenge the admissibility of the dying declarations. However, the defence has not been able to elicit anything of importance from this witness. He has recorded the FIR given by Haribhai Govindbhai, which has now become dying declaration upon his death and it is now at ex.

41.

19.PW-12 Kanubhai Nathabhai Bhabhor Ex. 43, was working as Deputy Mamalatdar at Anand. He is the person who had recorded the dying declaration of Haribhai Govindbhai and Girishbhai Motibhai Chavada. In his evidence, he has described in what manner he had recorded the dying declaration. In the cross-examination, certain suggestions have been made to him regarding mental and physical conditions of the patients to show that they were not in a proper frame of mind and proper physical condition to give dying declaration. These suggestions have been denied by this witness. In respect of dying declaration of Haribhai a suggestion has been made to him that the words 'police station, Bhadaran' have been interpolated later on. The suggestion has been denied by him. He has produced the dying declarations of these two persons on record. They are at ex. 45 and 46.

20.The last witness is PW-13 Dr. Girish Srivastava Ex. 51.At the relevant time, he was working as Assistant Professor in Karamsad hospital. Dr. Siddharth Shah who had examined injured persons on the date of the accident, was working under him. Since Dr. Siddharth had migrated to U.S.A., this witness has produced the case papers prepared by Dr. Siddharth. In the cross-

examination, an attempt has been made by the defence that if a patient was administered Fortvin injunction, he would not be in a proper state of mind since the drug affects central nervous system and as a result of the same, the patient may tend to hear music and see colour. This suggestion has been denied by the witness.

21. From the aforesaid evidence, it becomes clear that on 6.7.1993, a tanker around 5.30pm had turned turtle near the cemetery on Bhadaran – Gambhira road. The said tanker was carrying neptha, a highly inflammable chemical in liquid form. Consequently, there was profuse leakage and the liquid had spilled on the ground, spreading over the road and the surrounding area. Out of curiosity, a crowd of about 400 to 500 had gathered. The Bhadaran police station was intimated about this accident and on the oral instructions of PSO, several policemen including the present appellant had gone to the spot to maintain bandobast. It was at that time, there was sudden fire and several persons standing there or passing by the said road received burn injuries. They were admitted in the hospital at Karamsad and, three out of them, succumbed to the injuries during treatment. It is the say of the prosecution that it was the appellant who threw a burning match stick on the chemical, as a result of

which, the liquid suddenly caught fire causing injuries to the persons standing there. For that reason, the investigation was carried out by the police of Bhadaran Police Station and ultimately, the appellant was charge-sheeted for the aforesaid offences.

22.The question that is to be decided here is whether the evidence on record adequately proved that the appellant was present at the spot and it was he who had thrown burning match stick on the chemical and as a consequences thereof, there was extensive fire. As seen above, most of the witnesses have turned hostile and they have not supported the case of the prosecution. However, the evidence of PW-9 Sahedmiya Kasammiya shows that he was also working as Crime Writer in the Bhadaran Police Station and in accordance with the instructions given by the PSO , he along with Police Head Constable Himatbhai, present appellant, Constable Hibatullahkhan had gone there for maintaining bandobast. He has also identified the appellant in the court. So far as the evidence of Investigating Officer Jabbarbhai Hamirbhai is concerned, it also shows that the present appellant had gone to the spot. This witness has recorded the FIR of Haribhai, which is exhibited in the case as Ex. 41. The witness says that on receipt of the information in which the name of the

accused-appellant was disclosed, he had made inquiry about the appellant but he was not to be found but later on, he was traced out and he was arrested and taken into custody. Thus, so far as the oral evidence is concerned, there is no evidence whatsoever to show that it was the appellant who had thrown the burning match stick. This evidence only establishes the fact that the appellant along with other constable was present at the spot to maintain bandhobast. This fact has not been denied even by the appellant in his further statement recorded under sec. 313 of CrPC. His say is that since in the process of removing the crowd by the police, there was hot exchange of words between him and the members of crowd, the witnesses have falsely implicated him in the incident. Thus, he also does not deny his presence at the place.

23. The important question that is required to be determined is whether it was the appellant who threw the burning match stick at the place. For that purpose, reliance has been placed on the dying declaration by the prosecution. There are, in all, three dying declarations before the court. Two are the regular dying declarations recorded by the Deputy Mamlatdar at the hospital, and they are the dying declarations of Haribhai Govindbhai Patel at ex. 45 and Girishbhai

Motibhai Chavada at ex. 46. There is yet another dying declaration in the form of complaint or FIR given by Haribhai Govindbhai Patel which has been recorded by PW-9 Jabbarbhai Hamirbhai which is at ex. 41. So far as the dying declaration of Girishbhai Motibhai Chavada is concerned, it is stated that on 6.7.1993 at about 5.00 to 5.30p.m. while he was returning home from his field, he saw a tanker turned turtle. He therefore, went near the place and all of sudden there was fire. He has stated that he did not know how it happened. He was brought to the hospital by his paternal aunt and others in a matador Van. His dying declaration, therefore, does not help the prosecution to establish the fact that it was the appellant who had thrown the burning match stick and caused fire. However, the second dying declaration of Haribhai Govindbhai Patel shows that on 6.7.1993, while he was returning from his field around 5.30p.m., he saw a tanker turned turtle near the cemetery. He went there. At that time, Ramanbhai Writer attached to Bhadaran Police Station lighted a match stick and threw on the ground. There was a sudden fire. In response to question no. 18, he has replied that the incident took place not on account of any rivalry or vengeance but it was an accident. This witness has also given complaint or FIR to the police at ex. 41. It is

dated 7.7.1993. It is stated in the FIR that on the previous evening at about 5.30p.m., he along with his son Nileshkumar was returning from the field and when he came near cemetery he saw that a tanker had turned turtle on the road and village people had gathered there. He also saw that there were members of police staff of Bhadaran police station and a jeep parked near the road. He has further stated that the police persons included Head Constable Himatsinh, driver Raisinh and writer Ramanbhai. At that time, members of Gram Rakshak Dal and police writer Ramanbhai and Raisinh were trying to disperse the crowd. The crowd, for a while, used to withdraw and then again gather there. At that time, police writer Ramanbhai threw burning match stick on the ground and there was all of sudden fire. As a result of the fire, he, his son Nilesh, Vinubhai Dhulabhai Patel, Indravadan Dhulabhai, Girishbhai and Chhatrasinh Mahida of his village as well as Pramodbhai Manibhai and two sons of two Head Constables of Bhadaran police station had received injuries. He has further stated that the police writer Ramanbhai had negligently thrown a burning match stick on the ground and as a result of it, chemical caught fire and whole tanker was in flames and they had received burns. He has stated that Vinodbhai had expired during treatment.

24. Haribhai therefore, clearly attributes the cause of fire to the negligent act on the part of the appellant of throwing a burning match stick on the chemical which was on the ground. This person was residents of village Bhadaran itself. He not only knew the appellant but he also knew in what capacity he was working in the police station. The deceased had stated that the incident was purely an accident and not on account of any enmity or vengeance. Thus, it is very clear that Haribhai had no Axe to grind against the appellant. He has stated in the dying declaration and also in the complaint what he had seen at the time of incident. There was no reason for him to falsely involve the appellant in the incident. The presence of the appellant at the spot stands duly corroborated not only from the oral evidence of PW-9 Sahidmiya Kasammiya and PW-11 Jabbarbhai Hamirbhai but even from the statement of the appellant recorded under sec. 313 of CrPC. The Apex Court has in the decision rendered in the case of **Prakash Vs. State of M.P., reported in AIR 1993 SC p. 65** has observed as under:

> "In so far as the dying declaration is concerned, we are inclined to accept the finding of the High Court that the deceased was alive at least up to half an hour after the assault. He had been taken to the hospital where he received some treatment for about 10-15 minutes. It is not borne out from the evidence of the doctor that the injuries were so grave and the condition of the

> patient was so critical that it was unlikely that he could make any dying declaration. In the ordinary course, the members of the family including the father were expected to ask the victim the names of the assailants at the first opportunity and if the victim was in a position to communicate, it is reasonably expected that he would give the names of the assailants if he had recognised the assailants. In the instant case there is no occasion to hold that the deceased was not in a position to identify the assailants because it is nobody's case that the deceased did not know the accused persons. It is therefore, quite likely that on being asked the deceased would name the assailants. In the facts and circumstances of the case the High Court has accepted the dying declaration and we do not think that such a finding is perverse and requires to be interfered with. As a matter of fact, on second thought, the learned Additional Sessions Judge has accepted the dying declaration and has convicted Prakash on the basis of dying declaration."

25. It is, therefore, no doubt in my mind that the appellant was present at the spot at the time of incident and it was he who had thrown a burning match stick on the ground where highly inflammable liquid chemical namely neptha was spilled on account of accident. The panchanama of the spot shows that there was extensive fire as a result of which, the entire tanker had got burnt, not only that but even surrounding trees were also burnt. It is, therefore, very natural that some persons of the crowd of 400 to 500 people would become victim of it. There were about 7 to 8 injured persons, three of them later on expired. This unfortunate incident, therefore, had taken place solely due to the negligent and rash act of

appellant. In my opinion, the prosecution has been able to establish this fact beyond any reasonable doubt.

26. It is, therefore, necessary to decide whether the trial court was right in convicting the appellant for the offence under sec. 304 Part-II, 324, 435 and 285 of IPC. So far as sec. 304 Part-II is concerned, it prescribes punishment for culpable homicide not amounting to murder.

> 304. **Punishment for culpable homicide not amounting to murder.** - Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

27. This section is divided into two parts. First part of

sec. 304 applies where there is guilty intention, whereas the second part applies where there is knowledge. I am therefore, required to consider whether on the facts of the case, it is adequately proved by the prosecution that either of two ingredients was present. So far as the first part is concerned, it is out of question because it is not even the case of prosecution that appellant had any guilty intention to cause death or bodily injury likely to cause death. The trial court has however, accepted the case of prosecution that the appellant had knowledge by his act he was likely cause death of a person and despite it he had committed the act. The evidence on record shows that from the tanker there was leakage and the liquid chemical neptha got spilled all over the ground. However, there is no evidence whatsoever to show that the appellant knew that the chemical leaked from the tanker was neptha and it was highly inflammable. Had there been such evidence, it would have been a different story and it could have been presumed that he had knowledge that his act would result into fatal casualties. Such evidence is absent. It is, therefore, not possible for me to come to the conclusion that there was requisite knowledge on the part of the appellant to constitute offence under sec. 304 Part-II.

The conviction of the appellant on that count appears to be erroneous. Then the question would be what offence the appellant has committed. The appellant, as the evidence shows, was deputed there to maintain bandhobast and he along with other constables was doing the same. All of sudden in the process, he appears to have lighted the match stick, for what purpose, it is not on record, may be to scare the crowd. However, he could have been careful enough before throwing burning match stick on the ground that there was spillage of some liquid, which was not water and if the burning match stick was thrown on it, it might catch fire. He had done the act completely disregarding the safety of the persons gathered there including his own self. If that be so, his act would stand covered under the provisions of sec. 304A of IPC, which state that whoever causes death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. For the reasons discussed above, it is clear that the act is not culpable homicide not amounting to murder. The mishap had happened only on account of foolhardy act on the part of the appellant. It is the negligent and/or rash act of the appellant which has

directly caused extensive fire resulting into the injuries to various persons, three persons out of these, succumbed to their injuries. This is criminal negligence and rashness on the part of the appellant. I have, therefore, no hesitation in holding him guilty for the offence under sec. 304 A of IPC. It is a well settled principle of law by now that even if there is no charge a person can be held guilty of a lesser offence and convicted for the same. Mr. Shethna also does not dispute it. In the instant case, the charge is under sec. 304 of IPC and not under sec. 304A of IPC, but it is not in dispute that offence under sec. 304A of IPC is a lesser offence than the offence under sec. 304 IPC. I am, therefore, well within my bounds to alter the conviction of the appellant from sec. 304 Part-II of IPC to one under sec. 304A of IPC.

28.So far his conviction for the offences under sec. 324, 435 and 285 of IPC is concerned, it also required to be considered whether it is proper. So far as offence under sec. 324 is concerned, it deals with act of voluntarily causing hurt by dangerous weapons. In the present case, the appellant did not intend to cause any hurt to any particular person or persons in general. The incident took place due to his negligent and rash act and, therefore, conviction under sec. 324 of IPC

appears to be erroneous. So far as conviction under sec. 436 of IPC is concerned, it deals with mischief of by fire or any explosive substance with intent to cause damage to any property to the amount of one hundred rupees etc. Here also there is no intention to cause damage or even knowledge that the act is likely to cause such damage. Therefore, conviction under sec. 435 of IPC also appears to be erroneous. So far as conviction under sec. 285 of IPC is concerned, it deals with negligent conduct with respect to fire or combustible matter. Considering the facts of the present case, the conviction under sec. 285 of IPC appears to be just and proper.

29.I have carefully gone through the decisions cited by Mr. Shethna but they do not apply to the facts of this case, hence, they are not discussed in detail.

30. In the result, this appeal is partly allowed. The conviction of the appellant under sec. 304 Part-II of IPC is altered to one under sec. 304A of IPC. So far as conviction under sec. 324 and under sec. 435 of IPC is concerned, it is quashed and set aside. His conviction under sec. 285 is retained. Consequently, the order of sentence of 3 years S/I for the offence punishable under sec. 304 Part-II is altered to the term of S/I for one year and to pay fine of Rs. 250/-. The sentence

for offences under sec. 324 and 435 of IPC is quashed and set aside. The sentence imposed by the trial court for the offence under sec. 285 of IPC is retained. The default sentence imposed by trial court is also retained.

31. Mr. Shethna ld. Advocate for the appellant at this juncture requests for time to surrender. Mr. PR Abichandani ld. APP opposes the same. However, considering the facts and circumstances of the case and also the fact that up till now the appellant was on bail, two months' time is granted to the appellant to surrender.

(AKSHAY H. MEHTA, J.)

mandora/